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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-2034

DONALD WILSON,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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STATE OF ALABAMA,

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PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

Petitioner respectfully prays that a writ of certiorari issue to review the affirmance by the Alabama Court of Criminal Appeals of the judgment of the Circuit Court of Clarke County, Alabama, entered in the above entitled case on February 12, 1974.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama dated May 16, 1974, and the opinion of the Alabama Court of Criminal Appeals dated February 12, 1974, have not yet been reported. Petitioner is advised the opinions

were released to West Publishing Company on June 6, 1974. Copies of the opinions are appended hereto.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on February 12, 1974. A petition for rehearing was denied on the 19th day of March, 1974. The Supreme Court of Alabama entered a final order denying a petition for certiorari to the Alabama Court of Criminal Appeals on the 16th day of May, 1974.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3) and Rule 19, United States Supreme Court Rules.

QUESTIONS PRESENTED

1. Does the opinion of the Alabama Court of Criminal Appeals conflict with the definition of a defendant's Fifth and Sixth Amendment right to a trial by an impartial jury as set forth in Parker v. Gladden, 385 U.S. 363, 11 L.Ed.2d 420, 87 S.Ct. 468 (1966) and Turner v. Louisiana, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546 (1965)?

2. Were the attending circumstances of the trial of the Petitioner such as to deprive him of a trial by an impartial jury in violation of his Fifth and Sixth Amendment rights as set forth in Turner v. Louisiana, supra?

3. Did the Alabama Court of Criminal Appeals depart from the accepted and usual course of judicial proceedings or sanction such a departure by the trial court in Petitioner's case by refusing to review the denial of Petitioner's offer of evidence at

the hearing on motion for new trial that extraneous facts had been related to the sequestered jury by a deputy sheriff and others who were not bailiffs in violation of the principles set forth in Parker v. Gladden, supra, and Turner v. Louisiana, supra?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V
(Rights of Accused in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI
(Right to Speedy Trial, Witnesses, etc.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV
Section 1.
(Citizenship Rights Not to Be
Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULE 39.
RULES OF SUPREME COURT OF ALABAMA

This Court will not in term time, nor will the justices thereof in vacation consider an application for the writ of certiorari, or other remedial writ, or process, for the purpose of reviewing or revising any opinion or decision of the courts of appeals, unless it appears upon the fact of the application therefor that application has been made to the appropriate court of appeals for a rehearing of the point or decision complained of, and that said rehearing of the point or decision complained of, and that said application had been decided adversely to the movant, and the application to this court must be filed with the clerk of this court within fifteen days after the action of the appropriate court of appeals upon the said application for rehearing. The application must be on transcript paper and must be accompanied by a brief pointing out and arguing the point or decision sought to be revised or corrected.

The application for writ of certiorari to this court in a criminal case in which the death penalty was imposed as punishment will be considered as a matter of right. In all other cases, civil or criminal, applications for writs of certiorari will be granted only (1) from decisions initially holding invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or Federal Constitution; or (2) from decisions that affect a class of constitutional, state or county officers; or (3) from decisions where a material question requiring decision is one of first impression in Alabama, or (4) from a decision that is in conflict with a prior decision of this court on the same point of law. When (4) is the basis of the application, it must quote that part of the opinion of the appropriate court of appeals, and that part of the prior decision of this court with which the conflict is alleged.

If the court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue, it shall be so ordered, of which due notice shall be given by the clerk to the parties or their counsel, and the case shall stand for submission as herein provided, on briefs, nine from each party, and likewise oral argument if so desired. If oral argument is desired by petitioner, statement to that effect shall be filed with the clerk by petitioner within ten days after service on petitioner of the notice of issuance of the writ. If oral argument is desired by respondent, then he or his counsel shall, by endorsement on the last page of his brief, so state his desire. If neither party shall thus indicate a desire for oral argument,

the clerk of this court shall, when briefs from all parties have been filed with him as herein provided, immediately submit the case in term time upon the transcript and such briefs. If either party shall have made known a desire for oral argument, the clerk of this court shall endorse that fact on the proper docket and set the case down for oral hearing not less than ten days after notifying the parties, or their attorneys of record, in writing of such setting. Cases so set for oral argument shall be heard on the day set unless continued by the court for good cause shown.

Respondent's brief shall be filed with the clerk of this court within fifteen days after service on respondent of the notice of the issuance of the writ, and if not filed within that time, or within any extended time, the cause shall stand ready for submission.

Amended December 14, 1970. Title 7, Code of Alabama, Rules of Supreme Court, Rule 39, page 392, 393.

STATEMENT OF THE CASE

Petitioner was tried on an indictment charging murder in the first degree. He was adjudged guilty of murder in the second degree and sentenced to ten (10) years imprisonment. Petitioner gave notice of appeal and subsequently filed a motion for new trial. The motion for new trial was denied.

As grounds for the motion for new trial, the Petitioner asserted that "extraneous facts" had been related to the sequestered jury by a deputy sheriff and others not bailiffs in his case which facts prejudiced the minds of the jury. This contention by

Petitioner was raised by Petitioner for the first time by motion for new trial.

An appeal was taken to the Court of Criminal Appeals for the State of Alabama and both the judgment of conviction and denial of motion for new trial were made the basis of that appeal. On February 12, 1974, the Court of Criminal Appeals affirmed the actions of the trial court. Petitioner filed a motion for rehearing and on the 19th day of March, 1974, the motion for rehearing was denied.

Petitioner filed a Petition for Writ of Certiorari in the Supreme Court of Alabama, which was denied on May 16, 1974.

The questions presented to this Court were originally presented to the Circuit Court of Clarke County, Alabama, by a motion for new trial and subsequently throughout the Appellate Courts of the State of Alabama.

At the hearing on the motion for new trial, the Clerk of the Circuit Court of Clarke County, Alabama, testified that at the beginning of Petitioner's trial, he swore in two bailiffs who were placed in charge of the sequestered jury.

Unauthorized members of the sheriff's department mixed with the jury during the course of the trial. This was done even though two of the State's chief witnesses were deputy sheriffs.

The Petitioner's attempts to show that Deputy Webb and other unauthorized persons talked with the jury about the case were stopped when the trial court sustained objections on this subject.

In Petitioner's briefs to the Alabama Court of Criminal Appeals, the court was directly requested to review the following offer of testimony about "extraneous facts" related to the sequestered jury:

Witness Nettie Dotson:

"Q I will ask you if during the time y'all were eating if the man bailiff wasn't discussing the case with white men jurors on this case?

MR. KIMBROUGH: I object.

A I just heard somebody say something . . .

MR. KIMBROUGH: I object to what she heard.

JUDGE LINDSEY: I sustain the objection." (R. 227)

"Q But you did hear a discussion at that table that night?

MR. KIMBROUGH: We are going to object to that.

JUDGE LINDSEY: I sustain the objection. Let's not repeat.

MR. GILMORE: We except.

A Did you know prior to that night, after you had heard evidence in this case here, that Mr. Wilson, the defendant's father, had killed a black man?

MR. KIMBROUGH: I object.

JUDGE LINDSEY: I sustain the objection.

MR. GILMORE: We except. We offer it for the purpose of showing bias and prejudicial information came to this jury.

MR. KIMBROUGH: He is also asking this juror to impeach her own verdict.

Q Did you know that prior to that time?

MR. KIMBROUGH: I object.

JUDGE LINDSEY: I sustain the objection.

MR. GILMORE: Except." (R. 231)

The following occurred during the testimony offered by the Appellant of juror Charley Tate:

"Q I will ask you if during the course of that supper there that night did you hear it said at that table that Donald Wilson's, the defendant's, father had killed a black man?

MR. KIMBROUGH: I object to that.

JUDGE LINDSEY: I sustain the objection.

MR. GILMORE: Except.

Q I will ask you if you and one of the other jurors discussed the fact there at that table that night. . .

MR. KIMBROUGH: I object.

JUDGE LINDSEY: I sustain the objection.

MR. GILMORE: Except.

Q I will ask you if Mr. Bud Webb was present when that came up?

MR. KIMBROUGH: I object.

JUDGE LINDSEY: Sustain the objection.

MR. GILMORE: Except." (R. 236, 237)

"Q Were you ever in the presence of the sheriff during the trial of that case, Mr. Ray Sheffield?

A No more than he carried us to lunch.

Q How many times?

A I believe it was twice.

Q Did he talk to y'all?

MR. KIMBROUGH: I object to that.

A Nothing personal.

JUDGE LINDSEY: I sustain the objection.

MR. GILMORE: Except.

Q Was there some discussion between y'all members of the jury and the bailiffs and the shi riff (sic) about this case at any time while y'all were hearing the evidence in this case?

MR. KIMBROUGH: I object to that.

JUDGE LINDSEY: I sustain the objection.

MR. GILMORE: I except to the Court's ruling." (R. 237, 238)

Appellant's attorney was prevented from pursuing what conversations transpired between Deputy Sheriff Bud Webb and a juror when the following occurred during the testimony of juror Fern B. Pace:

"Q And you saw Mr. Bud Webb come over to the motel that night?

A I don't remember their names.

Q The man that serves as jailer down here, he came over there that night, didn't he?

A Yes, sir.

Q In fact, he came to the table and talked to y'all while you were eating supper that first night?

A Yes, sir, he sat at the table.

Q And talked to you?

MR. KIMBROUGH: I object to counsel. . .

Q Did he talk to y'all?

A He didn't say anything in particular.

Q I will ask you at that time and place if he didn't tell you the defendant's father, Austin Wilson, had killed a colored man?

A No, sir.

MR. KIMBROUGH: I object to that.

JUDGE LINDSEY: I sustain the objection.

A I didn't hear it."

"Q Did anybody attempt to influence your opinion about this case during the time when you and Nettie Dotson were in Deavers Motel room that night separated from the rest of the jury?

A No, sir.

MR. KIMBROUGH: That is all.

RECROSS-EXAMINATION BY MR. WEBB:*

Q But that night when y'all were eating supper the bailiff, Mr. Webb, told you his daddy had killed a colored man, didn't he?

MR. KIMBROUGH: I object.

JUDGE LINDSEY: I sustain the objection.

MR. GILMORE: Except." (R. 269 and 272)

These attempts and others made by Appellant's attorney to offer evidence as to extraneous facts, were blocked by the trial court.

The Court of Criminal Appeals in its opinion of February 12, 1974, reaffirmed

* This should be RECROSS-EXAMINATION BY MR. GILMORE.

Taylor v. State, 18 Ala. App. 466, 93 So. 78, and stated:

> "Under Taylor, 18 Ala. App. 466, 93 So. 78, the trial judge on the motion for new trial should have let the jurors testify of 'extraneous facts' which may have influenced the verdict and which were before them while deliberating. This is not to allow impeachment of the verdict but to determine the purity of the process leading to it."

The prejudicial extraneous fact in the Taylor case was:

> "that the judge of this court would not be satisfied unless the jury convicted the defendant."

The prejudicial extraneous fact Petitioner attempted to offer at the motion for new trial was:

> "I will ask you if during the course of that supper there that night did you hear it said at that table that Donald Wilson's, the defendant's, father had killed a black man?"

In the Taylor case the Alabama Court of Criminal Appeals held the trial judge committed error in not allowing the jurors to testify about the extraneous fact. In its opinion of February 12, 1974, the court, without reference to the facts, indicates that Taylor is inapplicable and that there was no offer of evidence on extraneous facts.

Judge Jones of the Alabama Supreme Court in his dissenting opinion to the order denying Petitioner's application for a writ of certiorari to the Court of Criminal Appeals points out that the record might well disclose extraneous facts which prejudiced the jury which tried Petitioner:

> "Petitioner, however, does incorporate in paragraph 4 by reference his application for rehearing and his original and reply briefs in support thereof, which I believe makes clear what he is saying, and this is at least in the ball park insofar as the spirit of Rule 39 is concerned. The error complained of is obvious by the apparent inconsistency of the first two paragraphs of Section V near the conclusion of Judge Cates' opinion. The first paragraph says that the trial judge should have let the jurors testify about 'extraneous facts' which may have influenced their verdict, and he then proceeds to say that this was harmless error (Rule 45) because no such testimony was adduced.
>
> It may well be that an examination of the record will prove that I am misinterpreting these two paragraphs or otherwise oversimplifying the issue; but it seems proper to me to grant the writ and then go to the record for a clearer understanding of the facts involving the issue which is here addressed by the Court below. The alternative is to deny the writ in a case where the opinion below contains an <u>obvious</u> inconsistency at worst and an <u>apparent</u>

inconsistency at best.

Then, too, we should consider the petitioner's dilemma in framing his petition in the classical language of Rule 39. To deny the petition on the scope of review is to allow the Court of Criminal Appeals' opinion to serve as a trap in the petitioner's effort to seek review, and this was certainly not the result intended by Judge Cates.

In my opinion, our denial of the writ under these circumstances violates, rather than conforms to, the spirit of Rule 39. I would grant the writ.

Heflin, C. J., concurs."

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and, invalidate the verdict, at least until their harmlessness is made to appear. Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892), Remmer v. United States, 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956), Parker v. Gladden, 385 U.S. 363, 11 L.Ed.2d 420, 87 S.Ct. 468 (1966), Turner v. Louisiana, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546 (1965). Suspicious circumstances are sufficient to entitle the accused to a new trial under the Bill of Rights.

In the case before this Honorable Court

there has been no dispute of the fact that there were private communications with the jury by members of the sheriff's department and other unauthorized persons. Petitioner has at every level attempted to get a review of the extraneous facts related to the jury which tried him.

There is a presumption of undue influence when third persons come into contact with a sequestered jury. The State of Alabama failed to overcome the presumption in this case.

On the hearing at the motion for new trial, evidence should have been allowed concerning the "extraneous facts".

Justice Jones in his dissent to the order denying certiorari to the Court of Criminal Appeals says that justice and due process would require a review of the circumstances concerning the contact of third persons with members of Petitioner's jury. He goes on to say, however, that the Petitioner cannot get review on this point because of the narrow scope of review provided by Rule 39 of the Alabama Supreme Court.

Petitioner prays this Court will not be bound by a narrow view, but that it will issue a writ of certiorari so that a review of the circumstances surrounding the jury's deliberations in his case can be finally had.

CONCLUSION

The attending circumstances of Petitioner's trial deprived him of a trial by an impartial jury. This Court should grant certiorari because the Alabama Court of

Criminal Appeals departed from accepted judicial proceedings or sanctioned such a departure by the trial court. Due process of law requires the writ to issue.

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 15th day of July, 1974, served a copy of the foregoing petition upon the Honorable William J. Baxley, Attorney General of the State of Alabama, by mailing a copy of same to his offices in Montgomery, Alabama, by United States mail, properly addressed and First Class postage prepaid.

JOHN L. LAWLER

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1973-74

Ex parte: Donald Wilson

S. C. 772 PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Donald Wilson

v.

State of Alabama)

PER CURIAM.

Writ denied.

Merrill, Coleman, Harwood, Bloodworth, McCall and Faulkn concur.

Heflin, C. J., Maddox and Jones, JJ., dissent.

JONES, JUSTICE (Dissenting).

The opinion of the majority in denying the writ is based on the scope of review issue and does not reach the merits of the case. This scope of review issue--Rule 39-- is frequently before us and we have many times cautioned the bar that compliance with this rule of court is jurisdictional. Aycock v. State, ____Ala.____, 277 So.2d 412 (1973).

The purpose of this dissent is not to register disagreement with Rule 39, nor am I in philosophical disagreement with the statutory structure of our intermediate appellate courts which establishes the Court of Civil Appeals and the Court of Criminal Appeals as courts of last resort. (See my dissenting opinion in Mathis v. State, ____Ala.____, ____So.2d____ (Ms., S. C. 555 and S. C. 556, May 9, 1974). Rather, the purpose of this dissent is two-fold: first, to register my disagreement with the majority's application of the rules of review in the context of the instant case; and, second, to again caution the practicing bar of this State that Rule 39 is the "roadmap" which must be followed as the only route to this Court's review of our intermediate appellate courts.

The Petition for the Writ of Certiorari to the Court of Criminal Appeals was originally assigned to me, and in the interest of economy of time I will quote my views of the case from the memorandum prepared by me and distributed to the other members of our Court prior to conference:[1]

> "Admittedly, petitioner's paragraph 4, which is the only point in the petition dealing with the substantive issue on which I would entertain the

1. This was on preliminary consideration only as to whether the writ would be granted, i.e., whether we would agree to review the case.

petition for the writ, is technically deficient in that there are no magical words conforming to Rule 39.

"Petitioner, however, does incorporate in paragraph 4 by reference his application for rehearing and his original and reply briefs in support thereof, which I believe makes clear what he is saying, and this is at least in the ball park insofar as the spirit of Rule 39 is concerned. The error complained of is obvious by the apparent inconsistency of the first two paragraphs of § V near the conclusion of Judge Cates' opinion. The first paragraph says that the trial judge should have let the jurors testify about 'extraneous facts' which may have influenced their verdict, and he then proceeds to say that this was harmless error (Rule 45) because no such testimony was adduced.

"It may well be that an examination of the record will prove that I am misinterpreting these two paragraphs or otherwise oversimplifying the issue; but it seems proper to me to grant the writ and then go to the record for a clearer understanding of the facts involving the issue which is here addressed by the Court below. The alternative is to deny the writ in a case where the opinion below contains an <u>obvious</u> inconsistency at worst and an <u>apparent</u> inconsistency at best.

"Then, too, we should consider the petitioner's dilemma in framing his petition in the classical language of Rule 39. To deny the petition on the scope of review is to allow the Court of Criminal Appeals' opinion to serve as a trap in the petitioner's effort to seek review, and this was certainly not the result intended by Judge Cates.

"In my opinion, our denial of the writ under these circumstances violates, rather than conforms to, the spirit of Rule 39. I would grant the writ."

Heflin, C. J., concurs.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 14 day of May 1974.

J. O. Sentell

Clerk, Supreme Court of Alabama

SEP 1974

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1973-74

1 Div. 312

Donald Wilson

v.

State

Appeal from Clarke Circuit Court

CATES, PRESIDING JUDGE

Murder, second degree: sentence, ten years and one day in the penitentiary.

Appellant's brief has not complied with Rule A 49 Ala. App. XXI.

I

The State's case rested on circumstantial evidence to the effect that the deceased, Shirley James, did not die from suicide by a rifle shot. The appellant and deceased, according to one witness, had quarreled shortly

before she was shot. Her left eye was "real black." The appellant alone was present with her when the ambulance came to carry her to the hospital. She died there.

At the hospital, a witness noticed that both the deceased's eyes were swollen and black and blue.

Nelson Grubbs, assistant State Toxicologist, testified that his post mortem examination indicated that the deceased's left half of her skull was "depressed prior to the passage of the bullet." His opinion was either/or, i. e., either the shot or the crushing of the head could have caused death. Grubbs found no powder burns or singed hair on deceased. He gave testimony as to the distance at which the trigger could have been touched by a suicide.

Appellant adduced testimony that the rifle belonged to deceased and that the house (which was his) was locked when he sought to enter. He would account for her skull condition because her body had been dropped when he and the ambulance attendant were moving her to a stretcher.

We consider that there was sufficient evidence to let the case go to the jury. Hence, refusing the affirmative charge was not error.

II

After the jury was selected and sworn the Record (p. 15) shows the following:

> "JUDGE LINDSEY: State your case to the jury.
>
> "During Mr. Kimbrough's statement of his case Mr. Gilmore objected as follows:
>
> "MR. KIMBROUGH: '. . . the indictment, which was brought by eighteen men and women just like you.'
>
> "MR. GILMORE: I object to that.
>
> "JUDGE LINDSEY: Overrule the objection."

An objection in proper form would have been subject to being sustained. An indictment is not evidence and it is extraneous to the trial

thereof to refer to how and by whom the indictment came into being. The office of the opening statement is to explain what the party making it expects the evidence to show. Knowles, 44 Ala. App. 163, 204 So. 2d 506.

It is proper for the indictment to go to the jury room with the jury. 23A C. J. S. Criminal Law § 1369.

In Sanders, 131 Ala. 1, 31 So. 564, McClellan, C. J., said, "It was necessary that the indictment should be taken by the jury on their retirement * * *." [1] Apparently, it is adjured in such cases that, upon request, the trial judge direct the jury that the true bill is not evidence. Little v. United States, 73 F. 2d 861. [2] The trial judge here so directed the jury.

Endorsed on the instant indictment (R. 2) was the clerk's legend:

> "Presented in Open Court to the Presiding Judge by the Foreman of the Grand Jury in the presence of 17 other Grand Jurors, this 27 day of August, 1971."

At the close of the oral charge the following appears without any exception being taken by the defendant:

> "Ladies and gentlemen of the jury, whatever your verdict is in this case, you will write it on the back of this indictment, one of your number signing it as foreman. For your convenience I have prepared the different forms of verdict which can be reached in this case, which I have charged you, and you may take this form here, and whichever verdict you reach, write it on the back of this indictment that you have with you, and one of your number sign it as foreman. You may retire to the jury room and begin your deliberations."

In Eady, 284 Ala. 327, 224 So. 2d 876 our Supreme Court laid down a requirement of protection of the record. In the instant case the point claimed erroneous was objected to only in general form without specification of grounds.

The other matters, i. e., letting the indictment go to the jury, and the endorsement thereon of the verdict comport with the accepted practise in Alabama courts. No motion to shield or paste over the legend endorsed of the presentment was made. Whether this should have been granted had it been made we need not here decide. See Eady, supra.

We consider no error is before us on this point.

III

In his brief appellant's counsel contends in part as follows:

> "The Court erred in allowing witness Nelson E. Grubbs to testify as an expert witness in the case. Witness Grubbs held forth as an expert in the case in the fields of medicine, ballistics, suicide, causes of death, ophthalmology, etc. without once being qualified as one with superior knowledge in any of the many fields in which he offered expert opinion testimony. Some of his testimony is based on the unknown calculations and observations of unknown persons.
>
> "The Appellant's attorney objected to witness Grubbs being allowed to ramble in and out of most specialities known to men but each time was overruled by the trial court.
>
> "A witness is not qualified as an expert unless there is proof or a stipulation that he is familiar with the subject upon which he is asked to give an opinion. Jenkins vs. State,

46 Ala. App. 719, 248 So. 2d 758."

To this contention the Attorney General counters with:

> " * * * Nowhere is it reflected in the record that the Appellant ever challenged the qualifications of Dr. Grubbs to give such testimony. Now, however, the Appellant presses upon this Court for the first time on appeal the argument that this case is due to be reversed because of the trial court's action in overruling his general objections to the testimony of Dr. Grubbs."

We consider there is no error in this regard. Ordinarily a witness's testimony becomes legal if received without objection. Jenkins, supra, represented an exception, i. e., lack of probable cause to support a warrantless search. In this latter situation the State was up against a prima facie presumption of unreasonableness. In the case below us now, no such burden is cast on the State as to its expert witness, or need for expert testimony.

Here we think the principle set out in Leeper Cleaning, etc. Co. v. McKinney, 230 Ala. 462, 161 So. 529 (5) covers the claim of error; also Harbin, 38 Ala. App. 251, 82 So. 2d 565 (1); and Greathouse, 47 Ala. App. 71, 250 So. 2d 609 (4).

IV

A State witness, Johnny Pugh, testified on direct that he saw Wilson strike and kick the deceased several times on the fatal night. On cross Pugh was confronted by defense counsel with prior contradictory statements. On redirect, over objection, the State elicited from Pugh his purported reason for his previous denial of having seen hostile acts by Wilson toward deceased.

This enquiry was proper, Campbell, 23 Ala. 44.

V

Under Taylor, 18 Ala. App. 466, 93 So. 78 the trial judge on the

motion for new trial should have let the jurors testify of "extraneous facts" which may have influenced the verdict and which were before them while deliberating. This is not to allow impeachment of the verdict but to determine the purity of the process leading to it.

There was irregularity by the bailiffs in allowing other persons to act as substitute bailiffs without approval of the judge. However, no evidence was adduced that any outsider, including the bailiffs, pseudo-bailiffs, or other persons contacted the jury, or made any conversation calculated to prejudice them against Wilson. Supreme Court Rule 45.

We have considered the entire record under Code 1940, T. 15, § 389 and conclude that the judgment should be

AFFIRMED.

All the Judges concur.

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1. As to misdemeanors, see Fisher, 28 Ala. App. 410, 185 So. 913.

2. The use in an indictment of an alias presents a question of whether or not the indictee has been shown by the evidence to have used the alias. If there is no such proof, but only on such request, the trial judge should have the alias shielded. United States v. Skolek, 474 F. 2d 582. See also, Eady, 284 Ala. 327, 224 So. 2d 876.

STATE OF ALABAMA	:	IN THE CIRCUIT COURT OF
Plaintiff,	:	CLARKE COUNTY, ALABAMA,
VS.	:	CRIMINAL DIVISION
DONALD WILSON, Defendant.	:	CASE NO. 3709-A

MOTION FOR NEW TRIAL

Comes the Defendant in the above entitled cause and moves the Court to set aside the verdict of the jury and the judgment rendered thereon on the 6th day of April, 1972, and to grant to theDefendant a new trial; and as grounds for said motion, the defendant sets down and assigns, separately and severally, the following:

1. The verdict of the jury is contrary to the evidence in the case.

2. The verdict of the jury is contrary to the law in the case.

3. The verdict of the jury is contrary to the law and evidence in the case.

4. The verdict of the jury is contrary to the great preponderance of the evidence in the case.

5. The verdict of the jury is contrary to the weight of the evidence in the case.

6. The verdict of the jury was contrary to the law as declared by the Court in its oral charge.

7. The jury verdict was a quotient verdict.

8. The jury was guilty of misconduct in rendering a quotient v verdict.

9. The verdict arrived at and the length of sentence imposed was by a quotient verdict.

10. The verdict of the jury is excessive.

11. The verdict of the jury is so excessive as to shock the conscience of the Court and was a result of the jury's unintended bias, passion and prejudice against the defendant.

12. For that the jury was allowed to separate.

13. For that the jury was not kept together the entire time during the trial of said cause.

14. For that the bailiffs were changed during the process of said trial without the consent of the Defendant.

15. That different bailiffs served with the jury during the night without the consent or approval of the Court.

16. That the jury was allowed to separate and talk to people during the process of said trial.

17. For that Nelson E. Grubbs, a witness for the State, was permitted to testify over Defendant's objections as an expert witness without being qualified.

18. For that Nelson E. Grubbs, a witness for the State, was permitted to give expert testimony over defendant's objections without any qualifications.

19. For that Nelson E. Grubbs, a witness for the State, was permitted to testify over Defendant's objections as to the cause of death without being qualified to give such testimony.

20. For that Nelson E. Grubbs, a witness for the State, was permitted to testify over Defendant's objections as a ballistice expert and give testimony conserning firearms that called for expert testimony without being qualified.

21. For that Nelson E. Grubbs, a witness for the State, was permitted to testify over Defendant's objections as to medical testimony without any qualifications, experience or training to qualify him as an expert.

22. For that Nelson E. Grubbs, a witness for the State, was permitted to testify over Defendant's objections to hearsay testimony that he had received from an optometrist in Mobile without any qualifications, experience or training to qualify him as an expert.

23. For that the jury was allowed and did discuss the case and consider evidence and matters that were not admitted into evidence in this case.

24. For that the Court erred in failing to give the requested affirmative charge for the Defendant.

FILED in this office this
2 day of May, 1972
/s/ S. A. ARMISTEAD
CIRCUIT CLERK

/s/ WYMAN O. GILMORE
WYMAN O. GILMORE
Attorney for Defendant

FILED
AUG 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2034

DONALD WILSON,
PETITIONER

vs.

STATE OF ALABAMA,
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

WILLIAM J. BAXLEY
Attorney General
State of Alabama

DAVID W. CLARK
Assistant Attorney General
State of Alabama

COUNSEL FOR RESPONDENT

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BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINION OF THE COURT BELOW

The opinion of the Court of Criminal Appeals of Alabama is not yet reported:

Donald Wilson v. State, 1st Division 312, Court of Criminal Appeals opinion dated February 12, 1974, rehearing denied March 19, 1974 and application for writ of certiorari

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Criminal Appeals of Alabama, rendered on February 12, 1974. Application to the Court of Criminal Appeals of Alabama was denied on March 19, 1974. A petition to the Supreme Court of Alabama for writ of certiorari was denied on May 16, 1974. Petitioner applies under the provisions of Title 28, Section 1257(3), United States Code and Rule 19, United States Supreme Court Rules.

III

QUESTION PRESENTED

Whether the order of the appellate court dismissing an appeal will support the Supreme Court's jurisdiction when the order is based upon failure to conform to state rules of practice in perfecting the appeal.

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

Petitioner, a white man, was tried on an indictment

charging him with murder in the first degree, found guilty of murder in the second degree and sentenced to ten years imprisonment. He gave notice of appeal and filed a motion for new trial, the latter being denied after a hearing thereon. The Court of Criminal Appeals of Alabama affirmed the case on February 12, 1974, and denied application for rehearing on March 19, 1974. Petition for writ of certiorari, filed in the Supreme Court of Alabama, was denied on May 16, 1974.

VI

SUMMARY OF ARGUMENT

Where the order dismissing the appeal is based upon the failure to conform to State rules of practice in perfecting the appeal, neither the order nor the lower court judgment will support the Supreme Court's jurisdiction. *Newman v. Gates*, 204 U.S. 89, 51 L.Ed. 385, *Chesapeake & Ohio Railway Company v. MacDonald*, 214 U.S. 191, 53 L.Ed. 963; *Hammerstein v. Superior Court*, 341 U.S. 491, 492, 95 L.Ed. 1135; *Cunningham v. Alabama*, 270 Ala. 731, 121 So.2d 890, cert. denied 364 U.S. 913, 81 S.Ct. 277, 57 L.Ed.2d 227.

VII

ARGUMENT

Petitioner seeks to argue again denial of his motion for new trial. After case was affirmed and rehearing denied in the Court of Criminal Appeals of Alabama, he filed petition for writ of certiorari in the Supreme Court of Alabama. Certiorari was denied by that Court on May 16, 1974 because petition failed to comply with the mandate of Rule 39, Re-

vised Rules of Practice in the Supreme Court that he had duly filed an Application for Rehearing in the Alabama Court of Criminal Appeals in this case, within the time required by law, raising the points hereinafter set forth in his application for writ of certiorari and that said application had been denied within the fifteen days prior to filing for certiorari. (See page 4 of petitioner's petition, first sentence).

Alabama appellate courts have held that compliance with Rule 39, supra, is jurisdictional. *Armstrong v. State*, 290 Ala. 256, 275 So.2d 702 (1973); *Duncan v. State*, 275 Ala. 290, 154 So.2d 305 (1963); Vol. 7, Alabama Digest, Criminal Law, Key No. 1071.

In the past this Honorable Court has held that if the order dismissing the appeal is based upon the failure to conform to state rules of practice in perfecting the appeal, neither the order nor the lower court judgment will support the Supreme Court's jurisdiction. *Newman v. Gates*, 204 U.S. 89, 51 L.Ed. 385; *Chesapeake & Ohio Railway Company v. MacDonald*, 214 U.S. 191, 53 L.Ed. 963; *Hammerstein v. Superior Court*, 341 U.S. 491, 492, 95 L.Ed 1135.

The latter case was one in which a federal question was attempted to be presented, and this Honorable Court, in denying certiorari in that case, held that an appeal from an order refusing to move the case to the United States Circuit Court for the Eastern District of Kentucky had to be taken within two years as provided for by the Kentucky Civil Code of Practice.

This Honorable Court denied certiorari in *Cunningham v. Alabama*, 270 Ala. 731, 121 So.2d 890, 364, U.S. 918, 81

S.Ct. 277, 57 L.Ed.2d 277 in a case wherein petitioner failed to conform to Rule 39, supra.

But if this Honorable Court wishes to look at the contentions of petitioner, respondent submits there is no merit therein as there was no harmful error shown. In fact, vague inferences of error were refuted by the testimony at the motion for new trial. Petitioner's contention was that Deputy Sheriff Webb sold some of the jurors at supper during the progress of the trial that petitioner's father had killed a black man.

Petitioner specifically directs the attention of the Court to a portion of the new trial testimony of juror Nettie Dotson at transcript page 227 wherein the trial court sustained the District Attorney's objection to a question calling for rank hearsay. Clearly this ruling cannot be erroneous.

The general rule obtaining in Alabama is that jurors may not give evidence to impeach their verdict.

In *Taylor v. State*, 18 Ala. App. 466, 93 So. 78, the case of principal reliance of the petitioner, an exception is established to this general rule. Nevertheless, the *Taylor* case, supra, is crucially dissimilar for the reason that there the defendant made an affirmative showing to the trial court that the testimony of the jurors would be that the sheriff had made statements of a prejudicial nature to the jurors during their deliberations.

In the case at bar it was patently incumbent upon the petitioner to make an affirmative showing to the trial court that the offered juror — witness's testimony would substantiate the claim of prejudicial statements by Deputy

Webb. The petitioner utterly failed to carry this burden in the form of a showing by proposed testimony of the existence of the extraneous influence he now asserts did in fact exist. This failure was fatal.

Not only was there no showing made but also no witness during the entirety of the new trial hearing ever even indicated that he would give testimony that the alleged statement of Deputy Webb was ever made.

In fact, Nettie Dotson specifically denied hearing Deputy Webb say that the Appellant's father had killed a black man (Tr.p. 228). The sustaining of the objection was cured by her answer.

Witness Charley Tate testified that he did not remember if Deputy Webb was even at the supper table on the night in question (Tr. p. 237).

Witness William Webb denied in his testimony that the killing of the black man was ever discussed (Tr. pp. 250-251).

Witness Fern Pace denied in her testimony that Deputy Webb told the story about the Appellant's father (Tr. p. 269).

Witness Leo Marshall denied in his testimony that the story about the Appellant's father was told (Tr. p. 280).

Witness John Witherspoon testified "No sir, ain't nobody brought that up," in reference to the story about the Appellant's father (Tr. p. 293).

As stated above, none of the other witnesses gave any indication whatsoever that their testimony would be to the effect that Deputy Webb had made such a statement.

It is undeniable, in view of the posture of the evidence presented to the trial court, that the Court cannot be placed in error for having overruled the petitioner's motion for new trial. The petitioner's argument supportive of the motion is unfounded supposition predicated on speculation that has no basis in the record.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that the order of the Supreme Court of Alabama denying petition for writ of certiorari upon its own motion because of failure to conform to Rule 39 of Revised Rules of Practice in the Supreme Court is an order which will not support the jurisdiction of this Honorable Court. No grounds are shown for granting the relief sought and the writ of certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

IX

CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of August, 1974, I served a copy of the foregoing brief and argument upon the attorney for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record as follows:

To: Honorable John L. Lawler
903 Commercial Guaranty Bank Building
Mobile, Alabama 36601

David W. Clark

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